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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

EMERGENCY SERVICES
RESTORATION, INC.,

Plaintiff and Respondent,

v.

ROCHELLE KIRK,

Defendant and Appellant.

B260563

(Los Angeles County
Super. Ct. No. BC544113)

APPEAL from an order of the Superior Court of Los Angeles County.
Kevin Clement Brazile, Judge. Affirmed.

Broedlow Lewis, Jeffrey Lewis and Kelly Broedlow Dunagan for Defendant and Appellant.

Artiano & Associates, James Artiano, Joanne K. Leighton and Lawrence S. Andrews for Plaintiff and Respondent.

Rochelle Kirk (Kirk) appeals from an order denying her anti-SLAPP¹ motion with respect to defamation causes of action in a complaint filed against her by Emergency Services Restoration, Inc. (ESR). She argues that ESR failed to establish a probability of prevailing on the merits. Secondly, she argues that ESR's action should have been abated. We find no error and affirm.

FACTS

Kirk sued ESR for negligence per se on the theory that it failed to properly remediate mold contamination in her home and caused approximately \$2.8 million in damages.

Several months later, in a separate action, ESR sued Kirk for intentional interference with economic relations, defamation, libel per se and injunctive relief. In relevant part, the complaint alleged:

Since before 1992, ESR has been in the business of emergency restoration, salvage, and water and sewage cleanup for people who are victims of accidental property damage caused by catastrophes such as flooding, sewage backups and fires. In August 2013, a plumber named Sage Beagle contacted ESR to drain water and sewage underneath the bathroom at Kirk's home. Two days later, an ESR technician pressure washed the area and drained the water into a collection tank mounted on an ESR truck. On November 21, 2013, Kirk followed an ESR technician to a home and informed the homeowner not to use ESR because it did a poor job on Kirk's home. In January 2014, Kirk wrote false statements about ESR on Ripoffreport.com, including: ESR is operating 100 percent illegally in the State of California; ESR "screwed things up so bad"; that "even if the job went perfect, you . . . can sue them" because ESR was unlicensed; and

¹ An anti-SLAPP motion is authorized by Code of Civil Procedure section 425.16 and designed to combat a SLAPP, i.e., a strategic lawsuit against public participation. (*Mundy v. Lenc* (2012) 203 Cal.App.4th 1401, 1407.) Code of Civil Procedure section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

ESR “acted in the capacity of a contractor by hiring or sending the techs . . . [and they] are therefore guilty of being an unlicensed contractor.” In April 2014, Kirk posted two reviews on ESR’s YouTube advertising video, describing ESR as “shady, negligent, fraudulent at best,” stating that potential customers should never use ESR, and averring that if the potential customers are directed by their plumber to ESR, to find another plumber. Next, Kirk posted three reviews on yelp.com stating that ESR operates 100 percent fraudulently, it was not licensed or certified, and it had no idea what it was doing. Last, Kirk posted a review on a Web site called Trustlink stating that because “ESR duly acted in the capacity of a contractor by hiring or sending the techs they are therefore guilty of being an unlicensed contractor.” Kirk’s written statements were attached as exhibits to the complaint.

Kirk filed an anti-SLAPP motion to ESR’s complaint. She asked that the trial court strike the complaint or, in the alternative, abate the action pursuant to Code of Civil Procedure section 430.10, subdivision (c) pending the outcome of Kirk’s negligence per se action against ESR. She claimed that ESR was operating without the contractor’s license required under Business and Professions Code section 7026,² and that the two individuals who did work at her home were not certified by the IICRC³ as advertised on ESR’s Web site. As a result, she argued that her statements about licensure and certification were true. In addition, she argued that any of the statements she made were nonactionable opinion.

In opposition, ESR stated that Kirk communicated two false verifiable facts to the public, namely, ESR was required to have a contractor’s license and operated without one, and ESR used uncertified technicians.

² All further statutory references are to the Business and Professions Code unless otherwise indicated.

³ IICRC stands for Institute of Inspection, Cleaning, and Restoration Certification.

The trial court granted the anti-SLAPP motion as to the first cause of action and denied it as to the second and third causes of action. Regarding the request for abatement, the trial court stated that the two cases should be related, and only then should the issue of abatement be decided.

This appeal followed.

DISCUSSION

In connection with an anti-SLAPP motion, there is a two-prong analysis. The first prong focuses on whether the targeted cause of action arises from acts in furtherance of the right of free speech or petition within the protection of the anti-SLAPP statute. The second prong focuses on whether the plaintiff has demonstrated a probability of prevailing on the merits. The denial of an anti-SLAPP motion is reviewed de novo. (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 845.)

There is no dispute that the targeted causes of action arise from acts in furtherance of the right of free speech within the meaning of anti-SLAPP law. Nor is there a dispute that ESR stated legally sufficient claims.⁴ Kirk contends that ESR failed to demonstrate a probability of prevailing on the merits because: (1) the statements about ESR operating without a required contractor's license were true; (2) the statements about ESR technicians not being IICRC certified were true;⁵ and (3) Kirk's opinions about her experience with ESR were not actionable.

If she does not prevail on the foregoing arguments, Kirk argues that we should nonetheless reverse and order the trial court to abate ESR's action.

⁴ The parties presume that all arguments pertain to both the defamation and the libel per se causes of action. Because they do not delineate, neither do we.

⁵ Per the complaint, Kirk stated that ESR was not certified. In connection with the anti-SLAPP motion, and now on appeal, the parties aver that Kirk stated (or essentially stated) that ESR's technicians were not certified. For purpose of this appeal, we accept that either Kirk made such a statement, or that the parties believe that the public would construe Kirk's statement about ESR not being certified as a statement that its technicians were not certified.

I. Relevant Anti-SLAPP Law.

“To satisfy the second prong, ‘a plaintiff responding to an anti-SLAPP motion must “state[] and substantiate[] a legally sufficient claim.” [Citation.] Put another way, the plaintiff “must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” [Citation.] ‘We consider “the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.” [Citation.] However, we neither “weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.” [Citation.] If the plaintiff ‘can show a probability of prevailing on *any part of its claim*, the cause of action is not meritless’ and will not be stricken; ‘once a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff *has established* that its cause of action has some merit and the entire cause of action stands.’ [Citation.]” (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.)

II. Defamation Law.

A false statement that causes injury to a person or entity’s reputation is defamation. “[T]he injury may occur by means of libel or slander. [Citation.] In general, . . . a written communication that is false, that is not protected by any privilege, and that exposes a person to contempt or ridicule or certain other reputational injuries, constitutes libel. [Citation.] A false and unprivileged *oral* communication attributing to a person specific misdeeds or certain unfavorable characteristics or qualities, or uttering certain other derogatory statements regarding a person, constitutes slander. [Citation.]” (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1243.) “Where a libelous statement ‘is defamatory *on its face*, it is said to be libelous per se, and actionable without proof of special damage. But if it is defamation *per quod*, i.e., if the defamatory character is not apparent on its face and requires an explanation of the surrounding circumstances (the ‘innuendo’) to make its meaning clear, it is not libelous per se, and is not actionable

without pleading and proof of special damages.’ [Citation.]” (*Burrill v. Nair* (2013) 217 Cal.App.4th 357, 382; Civ. Code, § 45a.)

III. ESR’s Probability of Prevailing on the Merits.

The first question is whether ESR was a contractor and had to be licensed. If so, Kirk’s statements about ESR operating illegally without a license were true and those statements do not support liability.

For purposes of chapter 9 of Division 3 of the Business and Professions Code, “‘contractor’ . . . is synonymous with ‘builder’ and, within the meaning of this chapter, a contractor is any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith, or the cleaning of grounds or structures in connection therewith, or the preparation and removal of roadway construction zones, lane closures, flagging, or traffic diversions, or the installation, repair, maintenance, or calibration of monitoring equipment for underground storage tanks[.]” (§ 7026.)

It is a misdemeanor for a person to act in the capacity of a contractor without being licensed. (§ 7028, subd. (a)(1).)

Kirk asks us to interpret section 7026 in a manner establishing that ESR was a contractor. When interpreting a statute, we must ascertain the intent of the Legislature in order to effectuate the statute’s purpose. If the language is clear and unambiguous, we are required to presume that the Legislature meant what it said and go no further. But if the statute is ambiguous, i.e., it is susceptible to more than one reasonable interpretation, we are permitted to resort to extrinsic factors. Such factors include the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, the statutory scheme of which the statute is a part, and the consequences that will flow from a particular interpretation. (*California Ins. Guarantee Assn. v. Workers’ Comp. Appeals*

Bd. (2012) 203 Cal.App.4th 1328, 1337; *In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1264–1265.)⁶

According to Kirk, the extraction, removal and hauling away of raw sewage constitutes “cleaning” within the meaning of section 7026. But section 7026 does not provide that a person is a contractor if it does no more than extract, remove and haul away raw sewage. Rather, it provides that a person is a contractor if it cleans grounds or structures in connection with contractor activities such as constructing or demolishing buildings, etc. Does a person fit the definition of “contractor” and “builder” when it cleans grounds or structures in connection with contractor activities such as constructing or demolishing only if it is the contractor with respect to those other activities? Or does a person fit the definition if it cleans grounds or structures in connection with such contractor activities of a third person?

Kirk does not discuss these ambiguities. Rather, she quotes *UDC-Universal Development, L.P. v. CH2M Hill* (2010) 181 Cal.App.4th 10, 24, as stating, “‘The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building and construction services. [Citation.]’” She then avers: “Section 7026 should be construed and applied to accomplish that purpose.” That is the extent of Kirk’s statutory interpretation. We deem her argument waived because she has not applied the rules of contract interpretation, and “[i]t is not our responsibility to develop an appellant’s argument.” (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.) And even if section 7026 can be read to mean that an entity is a contractor with a license requirement if it cleans grounds or structures in connection with *any* contractor activities such as constructing or demolishing, Kirk fails

⁶ ESR submitted the declarations of two experts who interpreted sections 7026 and 7026.1. Kirk properly objected to them. The trial court never ruled on the objections. We have not considered the declarations because expert opinions on questions of law are inadmissible. (*Communications Satellite Corp. v. Franchise Tax Bd.* (1984) 156 Cal.App.3d 726, 747 [“An expert witness may not properly testify on questions of law or the interpretation of a statute”]; *Satellite Corp. Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178.)

to argue that ESR was such an entity. As a consequence, Kirk failed to demonstrate that ESR was a contractor with a license requirement and that the statements attributed to her were truthful.

Next, we examine whether Kirk made false statements about ESR's technicians not being certified.

To support her anti-SLAPP motion, Kirk submitted a declaration in which she stated that the two technicians sent to her home by ESR were "Juan" and "Scott," and they falsely claimed to be certified by IICRC. She also submitted answers to form interrogatory No. 17.1 regarding responses to request for admissions in which ESR identified two technicians, Josh Hagewood (Hagewood) and Scott Omohumbro (Omohumbro), as persons with knowledge as to why ESR did not give an unqualified admission as to request for admission No. 1. Kirk did not attach request for admission No. 1.

In opposition, ESR submitted the declarations of Hagewood and Eugene Eppard (Eppard). They declared that they were the technicians who performed the work at Kirk's home on behalf of ESR, and that they were certified by IICRC. Certifications were attached to their declarations.

We conclude that ESR met its burden. The evidence that Hagewood and Eppard serviced Kirk and were certified established a prima facie case that Kirk made false statements about ESR's technicians.

In her reply, Kirk claims that the motion should have been granted because it was undisputed that "Scott" and "Juan" performed work at her home. She posits that her declaration did not conflict with the declarations of Hagewood and Eppard on that point. She suggests that their declarations merely establish that they did different work than "Scott" and "Juan." In other words, she suggests that four technicians worked on her home, and two were uncertified. We disagree. In Kirk's declaration, she refers to the "two" technicians sent to her home. She did not contend that ESR sent four technicians. Therefore, either the technicians were "Scott" and "Juan" or they were Hagewood and Eppard. We must accept ESR's evidence as true.

In one sentence in the reply, Kirk notes that ESR identified Hagewood and Omohumbro in response to form interrogatory No. 17.1. She does not explain why this is relevant. Presumably, she wants us to infer that Omohumbro is the “Scott” she says serviced her home. But there is no evidence that Omohumbro is the purported person named “Scott.” Additionally, we have not been provided with request for admission No. 1 propounded on ESR, so we do not know what ESR refused to admit and what evidence Omohumbro might have. The bottom line is that identification of Omohumbro in response to form interrogatory No. 17.1 does not establish that he was the person Kirk identified as “Scott,” and that he serviced her home.

Based on the foregoing, we conclude that ESR has a probability of prevailing on at least parts of its claims. As a consequence, the defamation and libel per se causes of action must stand. All other issues pertaining to the sufficiency and substantiation of ESR’s causes of action are moot.⁷

IV. Abatement was Properly Denied.

“The pendency of another earlier action growing out of the same transaction and between the same parties is a ground for abatement of the second action. [Citations.]” (*Leadford v. Leadford* (1992) 6 Cal.App.4th 571, 574.) “[W]here the court determines there is another action pending raising substantially the same issues between the same parties, it is to enter the interlocutory judgment specified in Code of Civil Procedure

⁷ In Kirk’s opening brief, under the heading “The Statements About Kirk’s Experience with ESR were Inactionable Opinion,” she states, “Kirk’s commentary that ESR is required to have a contractor’s license is more of her own opinion than fact.” She provided no legal authority or analysis, so the point is waived. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2.) Moreover, Kirk’s point went beyond the scope of the heading. That is an additional reason to find a waiver. (*Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1345, fn. 17.) Finally, we note that a statement is actionable if it contains a provable falsehood. (*GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 155.) If ESR is not a contractor, then Kirk’s statements asserting that ESR was a contractor operating without a license contained a provable falsehood.

Kirk’s briefs nowhere suggest that her statements about ESR lacking certification qualified as opinion.

section 597. [Citations.]” (*Ibid.*) As a result, Code of Civil Procedure section 430.10 provides that “[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer . . . , to the pleading on any one or more of the following grounds: [¶] . . . [¶] (c) There is another action pending between the same parties on the same cause of action.”

Kirk requested abatement in connection with her anti-SLAPP motion, citing Code of Civil Procedure section 430.10, subdivision (c). But that statutory provision only allows abatement to be requested by demurrer or answer. Kirk has not cited any authority for a party to request abatement of an action in connection with an anti-SLAPP motion, and we are aware of none. For that reason, abatement was properly denied. Moreover, abatement was properly denied because Kirk’s action and ESR’s action do not arise out of the same transaction or involve the same cause of action. Kirk’s negligence action arises out of the work ESR performed, and ESR’s action arises out of Kirk’s subsequent statements. Kirk does not suggest otherwise, which is fatal to her position. ““When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citations.]”” (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862.)

At the end of her opening brief, Kirk seems to suggest that abatement is proper on the theory that ESR should have filed a cross-complaint instead of a separate lawsuit. But once again, Kirk cited no authority.

DISPOSITION

The order is affirmed.

ESR shall recover its costs on appeal.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT